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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-935

MARVIN ALLEN, STEVEN JACOBSMEYER and
UNKNOWN POLICE OFFICERS,
Petitioners,

vs.

WILLIE McCURRY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Come now Marvin Allen, Steven Jacobsmeyer, and "unknown police officers", Petitioners herein, and respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on October 1, 1979.

OPINIONS BELOW

The opinion of the District Court, filed on October 13, 1978, is reported at 466 F.Supp. 515 and appears in Appendix A to this Petition, *post*. The opinion of the Court of Appeals, 606 F.2d 795, reversing the judgment of the District Court, is reproduced in Appendix B, *post*. Because the Court of Appeals alludes to matters outside the record on appeal, and for the convenience of this Court, the opinion of the Missouri Court of

Appeals, Eastern District, 587 S.W.2d 337, affirming the conviction of Willie McCurry on state felony charges arising out of matters alleged in his Complaint, is reproduced in Appendix C, *post*.

JURISDICTION

The judgment of the Court of Appeals was filed on October 1, 1979, and this Petition is filed within ninety days of that date. 28 U.S.C. §2101. No rehearing was sought. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether a convicted felon is estopped to maintain an action for damages under 42 U.S.C. §1983 on the basis of the same claim of unlawful search and seizure which was raised, fully litigated, and adjudicated adversely to him in a prior state criminal proceeding.

II. Whether persons bringing actions under 42 U.S.C. §1983 are barred by 28 U.S.C. §1738 or by federally formulated rules of collateral estoppel from relitigating constitutional claims (including Fourth Amendment claims) which have been raised, fully litigated, and decided adversely to them in prior state criminal proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amdt. IV provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amdt. XIV provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Civil Rights Act of 1871 (the "Ku Klux Klan Act"), 17 Stat. 13, 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

The federal judicial code, 62 Stat. 947, 28 U.S.C. §1738 provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

Following his state conviction on one count of illegal possession of heroin and two counts of assault with intent to kill with malice aforethought, and while his state appeal was pending (see Appendix B, A-6), Respondent Willie McCurry, pro se, commenced this action in the United States District Court for the Eastern District of Missouri on July 17, 1978. The complaint seeks damages from individual police officers "for the violation of the U.S. Constitutional Rights of the Plaintiff." (Appendix C, A-21.) The complaint has been construed to allege that (1) the police officers (Petitioners herein) conspired to conduct an illegal search of Respondent's home; (2) an illegal search of Respondent's home was carried out; and (3) Respondent was assaulted after being arrested. The action is apparently brought under 42 U.S.C. §§1983, and 1985(3), with federal jurisdiction invoked under 28 U.S.C. §1343. (See Appendix B, A-6; Appendix D.)

Subsequent to the filing of the Complaint, Petitioners moved for dismissal and also for partial summary judgment as to the claim of illegal search. The District Court granted the motion for summary judgment, holding that Respondent was collaterally estopped to litigate the legality of the search because an identical claim had been presented to the state court in the criminal prosecution and the search had been held lawful, although certain items not found in plain view had been suppressed. The District Court also dismissed the remainder of the complaint for reasons not here material.[1]

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[1]Petitioners do not seek review of the judgment of the Court of Appeals insofar as the allegations of assault are concerned.

On appeal, the Court of Appeals for the Eighth Circuit reversed the District Court in all respects. Although the Court of Appeals acknowledged that "the search and seizure aspect of his [McCurry's] claim was . . . essentially the same claim that was litigated at the suppression hearing" (Appendix B, A-7), the Court nevertheless concluded that collateral estoppel was not available to the police officers as a defense. The basis for this decision was stated as follows: "We conclude that because of the special role of the federal courts in protecting civil rights . . ., and because habeas corpus is now unavailable to appellant, see *Stone* v. *Powell,* [428 U.S. 465 (1976)], it is our duty to consider fully, unencumbered by the doctrine of collateral estoppel, appellant's §1983 claims." (Appendix B, A-10 - A-11.) In so holding, the Court of Appeals denied that it was passing on the general question of "whether collateral estoppel applies to §1983 actions when the issues raised in the §1983 suit were determined adversely to the §1983 plaintiff in an underlying state criminal trial." (*Id.,* A-17.)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. The Petition Ought To Be Granted Because the Questions of Federal Law Presented Herein Are of Serious National Importance and Must Be Settled By This Court.

A. There is a substantial likelihood that the decision of the Court of Appeals will encourage innumerable state prisoners to seek relitigation of claims of unlawful search and seizure through the medium of §1983 actions, and application of federal rules of collateral estoppel to such actions is necessary to avoid a subversion of Stone v. Powell.

In *Stone* v. *Powell,* 428 U.S. 465 (1976), this Court held "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.,* 494 (footnotes omitted). In the course of its opinion, the Court reaffirmed that the exclusionary rule is a judicially created remedy " 'designed to safeguard Fourth Amendment rights generally through its deterrent effect . . .,' " *id.,* 486, quoting *United States* v. *Calandra,* 414 U.S. 338, 348 (1974), and concluded that, in collateral proceedings, the societal costs of the application of the exclusionary rule significantly outweighed the deterrent effect gained thereby. 428 U.S. 491-93. In assessing the societal costs of the rule's application in collateral proceedings, the Court adverted to "serious intrusions on values important to our system of government," including effective utilization of limited judicial resources, the need for finality in criminal actions, minimization of friction between state and federal judicial systems, and the maintenance of the constitutional balance upon which federalism is founded. *Id.,* 491 n. 31.

In this case, the Court of Appeals expressed the concern that, "if collateral estoppel is to apply in §1983 actions raising search and seizure claims, there will be no federal forum for the victim of a search and seizure which allegedly violates the federal constitution." Appendix B, A-9 - A-10. Accordingly, it proceeded to attempt to assure availability of a federal forum by rejecting application of collateral estoppel to the complaint of unlawful search and seizure in this case.

It does not require clairvoyance to envisage the impact on §1983 litigation by state prisoners if the decision of the Court of Appeals in this case is left undisturbed. State prisoners checked by *Stone* v. *Powell, supra,* from relitigating search and seizure questions in federal court via habeas corpus will flock to the District Courts with pro se complaints modeled on Respondent's herein. Police officers who have seen their actions pronounced lawful by state courts will suddenly find themselves enmeshed in civil litigation in federal courts, with the specter of civil liability for those same actions looming large. In the meantime, what of the policy considerations underlying *Stone* v. *Powell*? The Court of Appeals airily ignored them, as it ignored this Court's clearly expressed idea that state courts can be relied upon to give full and fair consideration to federal constitutional claims. See Appendix B, A-10.

Stone v. *Powell, supra,* must be read as standing for the proposition that rules of federal law fashioned by federal judges ought to be enuniciated with an eye to fostering judicial economy and federal-state comity, without sacrificing the interests of justice. Like the exclusionary rule, res judicata and its corollary collateral estoppel[2] are essentially judge-made rules,

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[2]Petitioners use the term collateral estoppel as denoting rules of "issue preclusion," while res judicata is intended to denote doctrines of "claim preclusion". See generally Vestal & Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions, 19 Vand.L.Rev. 683 (1966).

and are probably more deeply embedded in Anglo-American jurisprudence than the exclusionary rule. See, e.g., *Kingston's (Duchess) Case,* 1 East, P.C. 468, 20 State Trials 355, 168 Eng.Rep. 175 (1776); Vestal & Coughenour, Preclusion/Res Judicata Variables: Criminal Prosecutions, 19 Vand.L.Rev. 683, 684 notes 5-7 (collecting cases) (1966); compare *Weeks* v. *United States,* 232 U.S. 383 (1914) with *Entick* v. *Carrington,* 19 State Trials 1030 (1765). Many of the considerations underlying res judicata and collateral estoppel - e.g., conservation of judicial time, preservation of respect for the administration of justice, and prevention of harassment of litigants - also underlie the rationale of *Stone* v. *Powell.* Compare 428 U.S. 491 n. 31 with Vestal & Coughenour, *supra,* 19 Vand.L.Rev. 719. Just as the Fourth Amendment does not inherently require relitigation of search and seizure questions in proceedings collateral to the judgment on the merits, see *Stone* v. *Powell, supra,* 428 U.S. 486, neither does the Amendment inherently prohibit the application of collateral estoppel in §1983 actions.

The Court of Appeals in this case seems to hold that the nature of the Fourth Amendment rights protected by 42 U.S.C. §1983 demands that a federal forum be available always to adjudicate alleged violations of those rights and forbids that state judgments on the same issues be given preclusive effect. However, the state courts are obligated to enforce federal law (including the Fourth Amendment) to the same extent as the federal courts, e.g., *Grubb* v. *Public Utilities Comm.,* 281 U.S. 470 (1930); *Robb* v. *Connolly,* 111 U.S. 624, 637 (1884); *P I Enterprises, Inc.* v. *Cataldo,* 457 F.2d 1012 (1st Cir. 1972); *Palma* v. *Powers,* 295 F. Supp. 924 (N.D.Ill. 1969); and it is "a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties." *Frank* v. *Mangum,* 237 U.S. 309, 333 (1915). Moreover, as this

Court itself has remarked in another context, "The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 328 (1971).

So long as the state courts provide an opportunity for full and fair litigation of Fourth Amendment claims, there is no compelling reason to refuse to apply sensible federal rules of collateral estoppel to §1983 actions based on identical claims.[3]

Application of such rules would be fully in accord with the common law of torts which supplies the standards for §1983 actions, see *Pierson* v. *Ray,* 386 U.S. 547 (1967), and many of the Courts of Appeals have so held. E.g., *Winters* v. *Lavine,* 574 F.2d 46 (2d Cir. 1978); *Rimmer* v. *Fayetteville Police Dept.,* 567 F.2d 273 (4th Cir. 1977);*Mastracchio* v. *Ricci,* 498 F.2d 1257 (1st Cir.

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[3]In *Brubaker* v. *King,* 505 F.2d 534 (7th Cir. 1974), it was suggested that collateral estoppel cannot operate to bar a claim of infringement of Fourth Amendment rights under §1983, because the issues in a criminal prosecution and the §1983 action are never the same: "The test . . . under §1983 is not whether the arrest was constitutional or unconstitutional or whether it was with or without probable cause, but whether the officer believed in good faith that the arrest was made with probable cause and whether that belief was reasonable." 505 F.2d 536-37 (footnotes omitted). The absurdity of this position is manifest. To recover under §1983, the plaintiff has the burden of proving, inter alia, deprivation of a constitutional right. *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 150 (1970); *Rosenberg* v. *Martin,* 478 F.2d 520 (2d Cir.), cert. denied, 414 U.S. 872 (1973). If an arrest or search is held constitutional (which is the determination necessarily made in a suppression hearing), then the plaintiff has no claim and the defendant need never establish the defense available to him under *Pierson* v. *Ray, supra.* See *Hunter* v. *Clardy,* 558 F.2d 290 (5th Cir. 1977); *Pritz* v. *Hackett,* 440 F.Supp. 592 (W.D.Wis. 1977); cf. *Rodriguez* v. *Jones,* 473 F.2d 599 (5th Cir.), cert. denied, 412 U.S. 953 (1973); *Koger* v. *Guarino,* 412 F.Supp. 1375 (E.D. Pa. 1976), aff'd, 549 F.2d 795 (3d Cir. 1977); *Firnhaber* v. *Sensenbrenner,* 385 F.Supp. 406 (E.D.Wis. 1974).

1974), *cert. denied,* 420 U.S. 909 (1975). Whether Fourth Amendment claims should now be treated differently on account of *Stone* v. *Powell* is a question which only this Court can answer, but the answer is, quite obviously, *no.*

In summary, the decision of the Court of Appeals in this case invites state prisoners to subvert *Stone* v. *Powell* by means of 42 U.S.C. §1983, and raises serious questions about the continued application of rules of collateral estoppel in §1983 actions based on alleged Fourth Amendment violations. "It is for the general welfare that a period be put to litigation." *Womach* v. *City of St. Joseph,* 201 Mo. 467, 100 S.W. 443, 445 (1907); see also *Thistlethwaite* v. *City of New York,* 497 F.2d 339 (2d Cir.), *cert. denied,* 419 U.S. 1093 (1974) (§1983 was not intended to foster career litigants). This same general welfare, as well as questions of federalism, demands that this Petition be granted and the judgment of the Court of Appeals be reviewed and reversed by this Court.

B. Application of uniform federal rules of collateral estoppel to §1983 actions will assure that meritorious claims receive prompt, effective attention from the federal courts, while protecting law enforcement officers from the harassment and vexation of groundless civil litigation.

Writing in dissent in *Monell* v. *Dept. of Social Services,* 436 U.S. 658, 17 FEP Cases 873 (1978), Mr. Justice Rehnquist referred to "the torrent of civil rights litigation of the last 17 years." 436 U.S. 724, 17 FEP Cases 897. A review of relevant statistics suggests that this description partook of understatement. Filings of civil rights actions in federal district courts during the period 1961 to 1973 grew from 261 to 7,679. *Administrative Office of the United States Courts, 1973 Annual Report* 128. During the fiscal years 1974 through 1978, filings of all types of actions by state prisoners alone grew from 13,423 to 16,969. *Administrative Office of the United States Courts, 1978 Annual*

Report 60. During fiscal 1977 and 1978, while all categories of prisoner filings increased 12.2%, civil rights suits filed by prisoners increased 25.9% to 10,366. *Id.*, 61. Between 1970 and 1978, civil rights complaints filed by state prisoners increased 379.3%, totaling some 9,730 in 1978. *Id.*, 75-76. All prisoner filings multiplied 907.1% between 1960 and 1978, while general civil filings grew a paltry 134.1%. *Id.*, 77.

Petitioners recognize that it is not fashionable these days to advance arguments based on fears of "a flood of litigation." However, Petitioners' arguments herein are not based on fear, but on reality. It cannot be gainsaid that a development which enhances the already monstrous volume of civil rights litigation also enhances the risk that insufficient attention will be given to meritorious claims by judges striving to keep dockets current, in face of a multitude of essentially frivolous claims - especially when both the serious and the frivolous claims are presented in the form of pro se complaints. Such a development is presented by the decision of the Court of Appeals in this case.

The opinion of the Court of Appeals bids fair to substantially increase the volume of civil rights litigation by state prisoners. The Court of Appeals professes to limit its consideration in this case to the *Stone* v. *Powell* situation; but by refusing to give preclusive effect to the state court judgment in this case, it not only undermines *Stone* v. *Powell* but also casts doubt (for the Eighth Circuit, at least) on the continued application of rules of collateral estoppel in §1983 actions generally, regardless of the underlying constitutional claim. See Appendix B, A-6 to A-12.

As illustrated, for example, by *Winters* v. *Lavine, supra*[4] the

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[4] *Winters* also addressed the application of 28 U.S.C. §1738 to actions under §1983, and concluded that both the statute and general rules of collateral estoppel barred the action there considered. 574 F.2d at 54-55. Petitioners assert that 28 U.S.C. §1738 can and should

application of a federal rule of collateral estoppel in §1983 actions will ensure that meritorious claims will receive full attention from the federal courts, while at the same time permitting early and economical resolution of baseless claims. State criminal defendants will be foreclosed from relitigating constitutional claims via §1983 only to the extent that they have actually litigated those claims without success in state court. Where criminal defendants prevail in state court (or where their constitutional claims are not reached), they will be free to litigate their claims in federal court. See, e.g., *Palma* v. *Powers, supra,* 295 F.Supp. at 942 (defendant who was acquitted in state prosecution held entitled to maintain §1983 action based on unlawful search; convicted co-defendant held barred); cf. *Fernandez* v. *Trias Monge,* 586 F.2d 848 (1st Cir. 1978) (no state ruling on the merits of constitutional claim). Thus, the state courts will be utilized as a screening mechanism, with resulting benefits to §1983 plaintiffs and defendants alike.[5]

C. The continued application of the exclusionary rule in criminal prosecutions compels the application of a federal rule of collateral estoppel to §1983 actions based on searches and seizures.

The operation of the exclusionary rule in criminal cases has occasioned considerable dissatisfaction and criticism. See, e.g.,

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be applied to §1983 actions when a state judgment is called in question, and §1738 provides an additional reason for giving the state judgment preclusive effect in this case, since Respondent McCurry's criminal conviction would work an estoppel under Missouri law. E.g., *LaRose* v. *Casey,* 570 S.W.2d 746 (Mo.App. 1978).

[5]Where state criminal defendants prevail on their constitutional claims in state court, the defendants will, of course, retain the right to assert their good faith-reasonable belief defense under *Pierson* v. *Ray,* supra.

California v. *Minjares*, ____ U.S. ____, 100 S.Ct. 9 (1979) (Rehnquist, J., dissenting from denial of stay); *Stone* v. *Powell*, *supra*, 428 U.S. 496-502 (Burger, C.J., concurring), 536, 541-42 (White, J., dissenting). The rule is now perceived not as a personal constitutional right, but as a judge-made rule intended to deter conduct which violates the Fourth Amendment. *Stone*, *supra*, 428 U.S. at 486. A sense that the rule is inadequate to protect Fourth Amendment rights has led this Court to infer a damage remedy from the Amendment itself. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Of course, esentially the same remedy is provided by 42 U.S.C. §1983. See. e.g., *Brubaker* v. *King*, *supra*, 505 F.2d. at 536-37.

Even though the exclusionary rule is not a constitutional rule, its application necessarily involves an extensive examination of the constitutionality of the search and seizure involved; only when the search is unconstitutional need the rule be applied. E.g., *Mincey* v. *Arizona*, 437 U.S. 385 (1978). Consequently, the continued imposition of the exclusionary rule on the states guarantees that cases such as Respondent's herein will continue to plague the federal courts, with a deleterious effect on law enforcement. The officer who conducts a search will be faced with the prospect that even if the state courts uphold him, he may nevertheless be mulcted in damages by the convicted defendant. On the other hand, if the constable blunders, not only will the criminal go free, but he will perhaps stand to be compensated by the hapless constable. Society will be left with freed felons and intimidated law enforcement personnel - the worst of both worlds.

Were the exclusionary rule abandoned, the focus of litigation concerning search and seizure would shift entirely to the civil forum, and it is probable that 42 U.S.C. §1983 and *Bivens*, *supra*, would provide a superior means of vindicating Fourth

Amendment rights than the exclusion of illegally seized evidence in criminal prosecutions.[6] Until that happy day, however, it is important to shield law enforcement officers from unnecessary litigation. The application of rules of collateral estoppel would do so to a large extent. By giving preclusive effect in §1983 cases to state court judgments on search and seizure questions, the federal courts would at least assure law enforcement officers that they will have to litigate civil actions only when there is a real question as to the validity of their conduct. While this would not obviate the anomalous result of dual benefit to patently guilty individuals, who are set free because of the exclusionary rule and then seek damages, it would eliminate the even more absurd result (rendered possible by the Court of Appeals' opinion in this case) that a convicted felon may obtain damages on account of police actions which led to his conviction.[7]

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[6]In *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957), this Court enunciated a doctrine of federal common law based on §301 of the Labor Management Relations Act, 29 U.S.C. §185. Drawing on, but not controlled by, the common law or state law of contracts, the federal courts have proceeded to create a body of federal law relating to what are essentially federal rights, i.e., collective bargaining rights and obligations.

Like §301, L.M.R.A., §1983 has also been construed to create a special federal remedy to protect and vindicate federal rights. E.g., *Monroe* v. *Pape,* 365 U.S. 167 (1961). The law to be applied is federal law, but the corpus of that federal law is drawn from the common law of tort. See *Pierson* v. *Ray, supra.* Although this Court has not expressly said so, it is evident that 42 U.S.C. §1983 can and should be construed as authorizing "federal courts to fashion a body of federal law for the enforcement" of federal constitutional rights. See *Textile Workers Union* v. *Lincoln Mills, supra,* 353 U.S. 451. If §1983 is so construed, the reason for the exclusionary rule passes away.

[7]It is sometimes argued that application of collateral estoppel in §1983 actions would unfairly restrict a person's choice of forum in which to litigate a federal claim. See generally, Theis, Res Judicata in

II. The Petition Ought To Be Granted Because the Decision of the Court of Appeals Is in Direct Conflict With the Overwhelming Weight of Authority in the Other Circuits.

As this Court remarked in *Preiser* v. *Rodriguez,* 411 U.S. 475, 497 (1973), "res judicata has been held to be fully applicable to a civil rights action brought under §1983." An examination of the authorities fully supports that view. Nearly every federal court addressing the issue has held that principles of res judicata and collateral estoppel apply in §1983 actions, and that prior state civil *and criminal* judgments will be given preclusive effect in accordance with those principles, even when the issues involved are constitutional issues. *Martin* v. *Delcambre,* 578 F.2d 1164 (5th Cir. 1978); *Winters* v. *Lavine, supra; Rimmer* v. *Fayetteville Police Dept., supra; Mastracchio* v. *Ricci,* supra; *Thistlethwaite* v. *City of New York, supra; Brazzell* v. *Adams,* 493 F.2d 489 (5th Cir. 1974); *Metros* v. *United States District Court,* 441 F.2d 313 (10th Cir. 1970); *Kauffman* v. *Moss,* 420 F.2d 1270 (3d Cir.), *cert. denied,* 400 U.S. 846 (1970); compare *Brubaker* v. *King, supra,* with *Williams* v. *Liberty,* 461 F.2d 325 (7th Cir. 1972); compare *Mulligan* v. *Schlachter,* 389 F.2d 231 (6th Cir. 1968) with *Curtis* v. *Tower,* 262 F.2d 166 (6th Cir. 1959); but see *Ney* v. *California,* 439 F.2d 1285 (9th Cir. 1971).

The Court of Appeals in this case was fully aware of the weight of authority, see Appendix B, A-7 - A-9. Nevertheless, the Court chose to ignore the overwhelming majority of cases and proceed to reject the application of collateral estoppel in this

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Civil Rights Act Cases: An Introduction to the Problem, 70 Nw.L.Rev. 859, 872-73 (1970). However, this argument is chimerical. The argument's underlying assumption is that state court defendants will always fail to successfully assert a Fourth Amendment violation. That assumption is manifestly false. Moreover, the critical question should be whether the claim is meritorious, not where it may be asserted. If there has been full and fair litigation of the issue, then there is no reason for an encore in another court, simply because it is a federal court. See, e.g., *Palma* v. *Powers, supra,* 295 F.Supp. 924, 937; see also *Smith* v. *Sinclair,* 424 F.Supp. 1108 (W.D.Okla. 1976).

case. In doing so, the Court of Appeals attempted to distinguish many of the cases on the ground that their rationale for applying collateral estoppel rested on the availability of federal habeas corpus, and were, therefore, emasculated (in search and seizure cases) by *Stone* v. *Powell.* In a few cases, this could be true. See, e.g., *Rimmer* v. *Fayetteville Police Dept., supra,* 567 F.2d at 276. In most of the cases, however, the availability of habeas corpus was neither discussed nor relied on, or was at most an alternative justification. E.g., *Mastracchio* v. *Ricci, supra; Thistlethwaite* v. *City of New York, supra* (alternative justification); *Metros* v. *United States District Court, supra.*

The Court of Appeals also felt justified in ignoring the weight of authority on the ground that the decisions expressly applying collateral estoppel in §1983 actions alleging unlawful search and seizure were decided prior to *Stone* v. *Powell.*

Whatever one may think of the Court of Appeals' view of the impact of *Stone* v. *Powell* on §1983 actions, it cannot be denied that the decision in this case squarely conflicts with *Metros* v. *United States District Court, supra.* In *Metros,* the Court of Appeals for the Tenth Circuit explicitly held that an application of rules of "issue preclusion" prevented the relitigation in a §1983 action of the validity of a search warrant issued by a state court.[8] In so holding, the Court of Appeals for the Tenth Circuit did not rely on the availability of habeas corpus, but rather solely on the traditional grounds for applying preclusion principles generally. 441 F.2d 316-17.

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[8]Generally, the standard for determining if litigation of a question in a civil suit is barred by a prior criminal conviction is whether the question was distinctly put in issue and directly determined in the prior criminal proceeding. E.g., *Kauffman* v. *Moss, supra,* 420 F.2d 1274. In *Metros, supra,* a state search warrant had been obtained, and the Court noted that, for collateral estoppel purposes, this unchallenged warrant constituted a prior judicial determination of the legality of the search. The defendant *could* have attacked the warrant by a motion to

The opinion of the Court of Appeals in this case is, therefore, not only a departure from settled principles of law under §1983, but also squarely conflicts with decisions of the Court of Appeals for the Tenth Circuit, *Metros, supra,* and also for the Fifth Circuit, see *Meadows* v. *Evans,* 550 F.2d 345, 351 (5th Cir. banc), *cert. denied,* 434 U.S. 969 (1977) (separate opinion of Tjoflat, Circuit Judge, citing *Shank* v. *Spruill,* 406 F.2d 756 (5th Cir. 1969) and *Jones* v. *Bales,* 58 F.R.D. 453 (M.D.Ga. 1972), *aff'd,* 480 F.2d 805 (5th Cir. 1973)). See also *Smith* v. *Sinclair,* supra, and *Palma* v. *Powers,* supra. This conflict should be resolved by this Court by reviewing and reversing the Court of Appeals in this case.

III. The Petition Ought To Be Granted Because the Questions Presented Herein Have Been Decided By the Court of Appeals For the Eighth Circuit in a Manner Which Conflicts With Other Decisions of That Court and Also With Decisions of the Supreme Court.

Prior to the decision in this case, it could have been averred with some confidence that the Court of Appeals for the Eighth Circuit adhered to the generally accepted rule that collateral estoppel applies to §1983 actions and operates as a bar to the relitigation of constitutional issues which were or could have been raised in a prior state court action. *Robbins* v. *District Court of Worth City,* 592 F.2d 1015 (8th Cir. 1979); *Goodrich* v. *Supreme Court of South Dakota,* 511 F.2d 316 (8th Cir. 1975); *Jenson* v. *Olsen,* 353 F.2d 825 (8th Cir. 1965); *Norwood* v. *Parenteau,* 228 F.2d 148 (8th Cir. 1955), *cert. denied,* 351

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suppress, but he did not, choosing instead to plead guilty. Hence, collateral estoppel applied. Whether a different rule should obtain in §1983 actions based on a warrantless search, when the defendant has pleaded guilty (since the validity of the search presumably need not be considered essential to the result, compare *Brazzell* v. *Adams, supra*), is not a relevant question in this case, since Respondent McCurry did not plead guilty and did, in fact, fully litigate the validity of the search.

U.S. 955 (1956). However, in its zeal to reach what it conceived to be a desirable result in this case, the Court has distinguished the foregoing cases on very flimsy grounds and has ignored others, so that it is clear that the Court was seeking to reopen the entire question of collateral estoppel in §1983 cases for the future.

The opinion in this case asserts that the Court of Appeals for the Eighth Circuit has never addressed the issue of whether collateral estoppel applies to §1983 actions when the issues raised by the §1983 plaintiff have been determined adversely to him in an underlying state criminal proceeding. Appendix B, A-6 to A-9. The opinion purports to distinguish *Robbins, Goodrich* and *Jenson,* all *supra,* primarily on the basis that the underlying state proceedings were civil. In so doing, the Court overlooked its statement in *McNally* v. *Pulitzer Pub. Co.,* 532 F.2d 69 (8th Cir.), *cert. denied,* 429 U.S. 855 (1976): "It is well established that prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was 'distinctly put in issue and directly determined' in the criminal action." 532 F.2d at 76, citing, inter alia, *Kauffman* v. *Moss, supra,* a case involving an underlying state criminal action. The Court also failed to sufficiently explain the nature of its application of collateral estoppel in *Goodrich,* supra, in which a §1983 plaintiff was precluded from relitigating issues decided in his disbarment proceeding, which the Court characterized as "quasi-criminal". 511 F.2d at 318 n. 4.

Of course, the inconsistency manifested by the Eighth Circuit in dealing with collateral estoppel in §1983 actions might not of itself warrant grant of certiorari, but for the fact that the Court of Appeals' latest inconsistency has led itself into conflict with decisions of the Supreme Court.

This Court has consistently held that issues decided in a criminal conviction may work an estoppel in a subsequent civil

proceeding, and that a state court decision of a federal question may be accorded preclusive effect. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951); *Sealfon* v. *United States*, 332 U.S. 575 (1948); *Grubb* v. *Public Utilities Comm., supra; Frank Mangum, supra;* cf. *Robb* v. *Connolly, supra.* The precise question in *Emich* involved §5 of the Clayton Act, 15 U.S.C. §16, and the use of criminal antitrust convictions as evidence in subsequent civil proceedings; but the decision in the case was made by referring to the general doctrine of collateral estoppel, *supra,* 340 U.S. at 568, and the case has been frequently cited as the source for collateral estoppel principles to be applied in §1983 actions. See, e.g., *Kauffman* v. *Moss, supra,* 420 F.2d at 1274. More recently, this Court has expressed itself in favor of limiting litigants to one full and fair opportunity to litigate an issue, *Blonder-Tongue, Laboratories, Inc.* v. *University of Illinois Foundation, supra,* and has explicitly recognized that res judicata has been held fully applicable to §1983 actions, *Preiser* v. *Rodriguez, supra;* but see *Ellis* v. *Dyson,* 421 U.S. 426, 440 (1975) (Powell, J., dissenting).

Thus, not only is the decision of the Court of Appeals in this case at war with other precedents of the same Circuit, it is also clearly at variance with the principles of collateral estoppel heretofore adopted and recognized by this Court to be applicable to §1983 actions. Compare *Emich Motor Corp.* v. *General Motors Corp., supra,* with *Preiser* v. *Rodriguez, supra.* The Court of Appeals for the Eighth Circuit should be corrected by means of granting this Petition and reversing the judgment below.

CONCLUSION

For the foregoing reasons, certiorari should issue to the Court of Appeals of the Eighth Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States District Court
Eastern District of Missouri
Eastern Division

Willie McCurry,

Plaintiff,

vs.

Marvin Allen, et al.,

Defendants.

No. 78-717C(1)

JUDGMENT

(Filed October 13, 1978)

A memorandum dated this day is hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants motion for summary judgment be and is sustained. Plaintiff's complaint is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment be and is denied.

Dated this 13th day of October, 1978.

/s/ J. H. Meredith
United States District Judge

Willie McCurry,

Plaintiffs,

vs.

Marvin Allen, et al.,

Defendants.

No. 78-717C(1)

MEMORANDUM

(Filed October 13, 1978)

This matter is before the Court on the motion of defendant St. Louis Police Department to dismiss for failure to state a claim, on the motion of defendants for summary judgment, and on the motion of plaintiff for summary judgment. For the reasons stated below, the Court will grant defendants' motion for summary judgment and dismiss plaintiff's complaint with prejudice.

This pro se action is brought under 42 U.S.C. 1983. Plaintiff alleges that on April 9, 1977, various police officers of the St. Louis Police Department conducted an illegal and unconstitutional search of his house following his arrest.

It appears from the police reports that defendants Jacobsmeyer and Allen went to plaintiff's home to make a purchase of heroin and knocked on the door. Plaintiff opened the front door and, after being asked to sell the undercover agents heroin, said "wait a minute, I'll get it". After a brief period of time plaintiff returned and shot both defendants, wounding them seriously.

Plaintiff was tried and convicted in St. Louis County Circuit Court of assault with intent to kill, Cause No. 77-862. Plaintiff then filed this action seeking $1,000,000.00 in damages for a "deliberate and intentional violation of the U.S. Constitutional Rights of the Plaintiff."

Plaintiff contends that a search that was conducted after the shooting by "unknown police officers" and officers Jacobsmeyer and Allen, both of whom were lying on the ground critically wounded, violated his right to protection from unlawful searches under the Fourth Amendment of the United States Constitution.

Defendants move for summary judgment on the grounds that the lawfulness of the search was litigated at the state level and is therefore barred from relitigation by res judicata.

It should first be noted that res judicata does not apply in this instance because different parties are involved. Rather, collateral estoppel will bar relitigation of only those issues which were actually litigated on the merits in the first action.

In support of the motion for summary judgment, defendants attach a copy of the Court's ruling on plaintiff's motion to suppress all evidence obtained from the alleged unlawful search. It reveals that the Court upheld the search of the house insofar as evidence in plain view was seized. The Court did suppress evidence (heroin) which was taken from a search of some dresser drawers. Nevertheless, the impact of that decision is that the police lawfully entered the house pursuant to a lawful arrest and lawfully searched the house for evidence.

This Court will grant defendants' motion on the ground that the only issue in the instant lawsuit—whether the entrance into plaintiff's home and the resulting search was lawful—was litigated on the merits at his criminal trial in state court and determined adversely to his position. Therefore, plaintiff may not collaterally attack that determination and he is collaterally estopped from relitigating the constitutionality of the search. *Rodriguez* v. *Beam,* 423 F. Supp. 906, 908 (S.D.N.Y. 1976), *Taylor* v. *New York City Transit Authority,* 433 F.2d 665 (2d Cir. 1970). Since no genuine issues remain for trial, and it is further evident that defendants are entitled to judgment as a matter of law, Rule 56(c), Fed. R. Civ. Proc., the motion will be granted and plaintiff's complaint dismissed. This ruling will obviously moot plaintiff's motion for summary judgment.

Dated this 13th day of October, 1978.

/s/ J. H. Meredith
United States District Judge

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 78-1849

Willie, McCurry,

Appellant.

v.

Marvin Allen, Steven Jacobsmeyer, and Unknown Police Officers, St. Louis Police Department, St. Louis, Missouri,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: April 19, 1979

Filed: October 1, 1979

Before LAY, HEANEY and McMILLIAN, Circuit Judges.

McMILLIAN, Circuit Judge.

Willie McCurry appeals from a judgment of the district court granting appellees' motion for partial summary judgment and dismissing with prejudice appellant's entire § 1983 civil rights complaint. 42 U.S.C. § 1983. Appellant was convicted of illegal possession and assault with intent to kill in state court pro-

ceedings. Subsequently, appellant filed a § 1983 action alleging violation of his constitutional rights in connection with his arrest and naming as defendants two individual police officers, "unknown police officers," and the City of St. Louis Police Department. The district court granted the motion for summary judgment on the basis of collateral estoppel.

For reversal appellant argues that the trial court erred in applying the doctrine of collateral estoppel to bar appellant's § 1983 action and in dismissing with prejudice appellant's entire § 1983 complaint. For the reasons discussed below, we reserve the judgment of the district court and remand for further proceedings not inconsistent with this opinion.

On April 9, 1977, six or seven undercover police officers went to appellant's house on an informant's tip that appellant was currently selling heroin. Two officers were to make a heroin purchase while the other officers remained secluded in nearby bushes. The two officers knocked on the front door of appellant's home, and, when appellant came to the door, asked if he had some "caps" (capsules of heroin) they could purchase. Appellant said, "Wait a minute," or something to that effect, and came back shooting. The two officers standing at the door were seriously wounded. The other officers opened fire and a gun battle ensued. Additional officers arrived until there were about thirty-five officers at the scene. After all officers had arrived, one of the officers announced with a bullhorn, "We are police, let us in," and "Come out of the house, no action will be taken." Appellant and his father then came out of the house. The officers, suspecting that there were additional persons within, rushed into the house to check. Some time thereafter, exactly when is not clear from the record, Officer Brand, who had been designated as the "seizing officer," entered the house and found the items which are the subject of the search appellant argues in unconstitutional.

Before trial appellant made a motion to suppress the evidence discovered during the search. After the suppression hearing, the state trial court granted appellant's motion in part by suppressing the evidence found in drawers and "among tire." The court denied the motion as to evidence found in plain view.

At trial appellant was found guilty on one count of illegal possession of heroin and on two counts of assault with intent to kill with malice aforethought. *State* v. *McCurry,* No. 77-862 (Mo. Cir. Ct. Jan. 6, 1978), *aff'd,* No. 39-999 (Mo. Ct. App. Aug. 14, 1979).

On July 7, 1978, appellant filed a § 1983 claim for $1,000,000 in damages against individual police officers based on the following alleged violations of his constitutional rights: (1) the police officers conspired to conduct an illegal search of his home, (2) his home was illegally searched, and (3) he was assaulted by police officers upon being arrested.[1] The district court granted defendants' motion for summary judgment on the ground that:

> the only issue in the instant lawsuit—whether the entrance into plaintiff's home and the resulting search was lawful—was litigated on the merits at his criminal trial in state court and determined adversely to his position. Therefore, plaintiff may not collaterally attack that determination and he is collaterally estopped from relitigating the constitutionality of the search.

McCurry v. *Allen,* No. 78-717C(1) (E.D. Mo. Oct. 13, 1978). This appeal followed.

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[1]We note that appellant learned the name of the police officer who allegedly assaulted him subsequent to the filing of the § 1983 action. Appellant should be granted leave to amend his complaint in this respect.

> In passing upon a motion for summary judgment the court is required to view the facts in the light most favorable to the party opposing the motion and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts disclosed in the pleadings, depositions and affidavits filed in the case.

EEOC v. *Liberty Loan Corp.*, 584 F.2d 853, 857 (8th Cir. 1978) (citations omitted).

We find that the district court was erroneous in granting the motion for summary judgment. The district court improperly held that the *only* issue in the case was the allegedly unconstitutional search and seizure. In addition to his search and seizure claim, appellant also alleged that he had been assaulted by police officers upon arrest. From the district court's memorandum, it is apparent that the district court overlooked this serious allegation. Upon remand the district court should give the assault and conspiracy claim appropriate consideration. Further, the district court ultimately granted appellee's § 1983 action was barred by collateral estoppel. When appellant filed his § 1983 action seeking damages for the violation of his civil rights, the search and seizure aspect of his claim was, as we acknowledge, essentially the same claim that was litigated at the suppression hearing. Unlike the district court, however, we do not believe that this requires the conclusion that appellant's § 1983 claim is barred by collateral estoppel.

Numerous courts have addressed the general question whether collateral estoppel applied to § 1983 actions when the issues raised in the § 1983 suit were determined adversely to the § 1983 plaintiff in an underlying state criminal trial. The First,[2]

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[2] *Fernandez* v. *Trias Monge*, 586 F.2d 848, 854 (1st Cir. 1978); *Mastracchio* v. *Ricci*, 498 F.2d 1257, 1260 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975).

Second,[3] Third,[4] Fourth,[5] Fifth,[6] Sixth,[7] and Tenth[8] Circuits, as well as numerous district courts,[9] have held that collateral estoppel is appropriately applied in such circumstances. This circuit has not yet addressed this issue[10] and we do not do so now.

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[3] *Winters* v. *Lavine,* 574 F.2d 46, 58 (2d Cir. 1978); *Turco* v. *Monroe County Bar Ass'n,* 434 U.S. 834 (1977); *Thistlethwaite* v. *City of New York,* 497 F.2d 339, 341-43 (2d Cir.), *cert. denied,* 419 U.S. 1093 (1974).

[4] *Kauffman* v. *Moss,* 420 F.2d 1270, 1274 (3d Cir.), *cert. denied,* 400 U.S. 846 (1970).

[5] *Wiggins* v. *Murphy,* 576 F.2d 572, 573 (4th Cir. 1978), *cert. denied,* 99 S. Ct. 874 (1979); *Rimmer* v. *Fayetteville Police Dep't,* 567 F.2d 273, 276 (4th Cir. 1977); *Moye* v. *City of Raleigh,* 503 F.2d 631, 634 (4th Cir. 1974).

[6] *Martin* v. *Delcambre,* 578 F.2d 1164, 1165 (5th Cir. 1978); *Meadown* v. *Evans,* 529 F.2d 385, 386 (5th Cir. 1976), *aff'd en banc,* 550 F.2d 345, *cert denied,* 434 U.S. 969 (1977); *Brazzell* v. *Adams,* 493 F.2d 489, 490 (5th Cir. 1974).

[7] *Mulligan* v. *Schlachter,* 389 F.2d 231, 233 (6th Cir. 1968).

[8] *Metros* v. *United States District Court,* 441 F.2d 313 (10th Cir. 1971).

[9] *See, e.g., Olitt* v. *Murphy,* 453 F. Supp. 354, 358-60 (S.D.N.Y.), *aff'd without opinion,* 591 F.2d 1331 (2d Cir. 1978); *Hammer* v. *Town of Greenburgh,* 440 F. Supp. 27, 29 (S.D.N.Y. 1977), *aff'd without opinion,* 578 F.2d 1368 (2d Cir. 1978); *Smith* v. *Sinclair,* 424 F. Supp. 1108, 1111-12 (W.D. Okla. 1976); *Rodriquez* v. *Beame,* 423 F. Supp. 906, 908 (S.D.N.Y 1976); *Moran* v. *Mitchell,* 354 F. Supp. 86, 88-89 (E.D. Va. 1973). *But see generally* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II,* 60 VA. L. REV. 250 (1974); Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem,* 70 NW. L. REV. 859 (1976); *Developments in the Law-Section 1983 and Federalism,* 90 HARV. L. REV. 1133 (1977).

[10] In *Jenson* v. *Olson,* 353 F.2d 821 (8th Cir. 1965), this court applied preclusion principles in a federal civil rights action, but only to

A more specific issue, and one which is complicated by unusual circumstances, is presented in this case. The specific issue is whether appellant's § 1983 claim raising search and seizure questions is barred by collateral estoppel; the unusual circumstance is that since 1976, search and seizure claims, except in a few situations, can no longer be raised by state prisoners in federal habeas corpus actions. Thus, if collateral

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bar relitigation of a purely factual matter; the federal court considered fully the plaintiff's constitutional claims. Recently this court has applied preclusion principles to constitutional claims previously litigated in state courts but the underlying state proceedings were civil. *See Robbins* v. *District Court,* 592 F.2d 1015 (8th Cir. 1979) (termination of parental rights); *Goodrich* v. *Supreme Court,* 511 F.2d 316 (8th Cir. 1975) (disbarment proceedings). Thus we have not yet addressed the particular problems which arise when the prior state proceeding was criminal and the constitutional rights at stake are fourth amendment rights.

The Seventh and Ninth Circuits have not yet addressed this issue directly. The Ninth Circuit, in *Ney* v. *California,* 439 F.2d 1285 (9th Cir. 1971), found it unnecessary to decide if collateral estoppel applies, in general, to § 1983 actions because it found the elements of collateral estoppel (referred to as res judicata by the Ninth Circuit) were not met (the issue raised in the § 1983 claim was not raised at the state court proceedings). In dicta, however, the Court stated that applying res judicata to federal civil rights actions would render the Civil Rights Acts a "dead letter." *Id.* at 1288. The Ninth Circuit has apparently not addressed the issue since 1971.

The Seventh Circuit's position is initially appealing. In *Brubaker* v. *King,* 505 F.2d 534, 536-37 (7th Cir. 1974), the Court held that the issue to be considered at a suppression hearing in a state criminal trial (the constitutionality of the search) was not the same issue (good faith and reasonable belief the search was with probable cause) presented in a § 1983 suit against police for damages. Therefore, the Seventh Circuit held collateral estoppel could not, by definition, apply to § 1983 actions in which the underlying issues had previously been litigated in state trial courts. The problem we see with this analysis is that it would be very difficult, practically speaking, for a federal court to subsequently hold in a § 1983 claim that officers were *not* acting in good faith or with "reasonable belief" if the state court has already held the search to be constitutional.

estoppel is to apply in § 1983 actions raising search and seizure claims, there will be no federal forum for the victim of a search and seizure which allegedly violates the federal constitution.

Of the seven circuits which have held that collateral estoppel is applicable to § 1983 actions, only two were confronted with § 1983 actions which raised search and seizure claims, and both of these courts considered this issue before *Stone* v. *Powell,* 428 U.S. 465 (1976), when federal habaes corpus relief became unavailable. *Metros* v. *United States District Court,* 441 F.2d 313 (10th Cir. 1971); *Mulligan* v. *Schlachter,* 389 F.2d 231 (6th Cir. 1968). Moreover, many of the courts which concluded that collateral estoppel should apply to § 1983 actions expressly based their holding on the fact that federal habeas corpus relief, and thus a federal forum, was then available. *Rimmer* v. *Fayetteville Police Department,* 567 F.2d 273, 276 (4th Cir. 1977); *Thistlethwaite* v. *City of New York,* 497 F.2d 339, 343 (2d Cir.), *cert. denied,* 419 U.S. 1093 (1974); *Alexander* v. *Emerson,* 489 F.2d 285, 286 (5th Cir. 1973) (per curiam); *Moran* v. *Mitchell,* 354 F. Supp. 86 (E.D. Va. 1973); *cf. Fernandez* v. *Trias Monge,* 586 F.2d 848 (1st Cir. 1978) (commonwealth supreme court denial of certiorari in juvenile court proceedings imported no view on merits of case). Chief Justice Burger in his concurring opinion in *Stone* v. *Powell* partially justified rendering habeas corpus unavailable as a remedy for fourth amendment claims on the basis that alternative remedies were still available. 428 U.S. at 500-01. A § 1983 damage action is clearly one of the more obvious of such alternative remedies.

We conclude that because of the special role of federal courts in protecting civil rights, *e.g., Mitchum* v. *Foster,* 407 U.S. 225, 242 (1972) (federal courts as guardians of the people's federal rights); *but cf. Stone* v. *Powell, supra,* 428 U.S. at 493-94 n.35 ("Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitu-

tional rights in the trial and appellate courts of the several States."), and because habeas corpus is now unavailable to appellant, *see Stone* v. *Powell, supra,* 428 U.S. at 492-94 & n.37, it is our duty to consider fully, unencumbered by the doctrine of collateral estoppel, appellant's § 1983 claims.

Nonetheless, although we are not collaterally estopped by the judgment of the Missouri courts on appellant's fourth amendment claim, we believe it appropriate to temporarily abstain until the Missouri courts have had the opportunity to directly review appellant's conviction and the underlying search of his home. It is clear that if appellant was seeking injunctive or declaratory relief, we would have no choice but to abstain until the state criminal proceedings had run their course. *Juidice* v. *Vail,* 430 U.S. 327, 333-36 (1977); *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 604-07 (1975); *Younger* v. *Harris,* 401 U.S. 37, 44 (1971). Whether abstention is also mandatory when only damages are sought in an § 1983 action has been explicitly left open by the Supreme Court. *Juidice* v. *Vail, supra,* 430 U.S. at 399 n.16. In deference to the state courts, however, we believe it appropriate to abstain under the present circumstances as well.

Therefore the district court's order granting summary judgment for defendants-appellees is reversed and the district court is ordered to stay appellant's § 1983 action in order to prevent the tolling of the statute of limitations pending the Missouri courts' review of appellant's conviction. We realize that by abstaining we are refusing appellant immediate relief and committing him to perhaps several years of litigating his § 1983 claim, which appears, from the record before us, to be serious and substantial. This is most unfortunate[11] but it is the price ex-

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[11] "This case dramatically diagrams the pitfalls that snare or nearly snare litigants and courts alike when a constitutional claim is brought in federal courts that involves an ongoing state prosecution." *Fernandez* v. *Trias Monge, supra,* 586 F.2d at 849; *cf. Trainor* v. *Hernandez,* 431 U.S. 434, 470 (1977) (Stevens, J., dissenting) (characterizing the Supreme Court's abstention doctrine as "increasingly Daedalian").

acted by our federal-state court system. *See Huffman* v. *Pursue, Ltd., supra,* 420 U.S. at 607, *citing Younger* v. *Harris, supra,* 401 U.S. at 44.

For the foregoing reasons the order of the district court is reversed and remanded for further proceedings as directed herein.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX C

In the Missouri Court of Appeals
Eastern District
Division One

State of Missouri, Respondent, vs. Willie McCurry, Appellant.	No. 39999 Appeal from the Circuit Court City of St. Louis Hon. Harold L. Satz, Judge Opinion Filed: August 14, 1979

Defendant appeals from his conviction by a jury of two counts of assault with intent to kill with malice aforethought and one count of possession of a controlled substance—heroin. The court, acting pursuant to the second offender act, sentenced defendant to two thirty year consecutive terms on the assaults and a concurrent ten year term on the heroin charge. We affirm.

At 10:30 p.m. on April 9, 1977, several policemen from the Tactical Anti-Crime Team (TACT) of the St. Louis Police Department went to a home on North Market in St. Louis. Their intention was to make a purchase of narcotics at that location and then arrest the seller. Two officers, Jacobsmeyer and Allen, went up to the door of the premises and knocked. The remaining officers secreted themselves at the rear of the house and near the front door. Defendant opened the door and Allen said they had been sent by Victor Murphy and wanted to buy "two caps" or "two buttons"—referring to heroin. Defendant responded that they should wait while he got what they wanted. Defendant then left the doorway closing the door until it was slightly ajar. Jacobsmeyer and Allen signalled to the nearby police officers who moved closer to the doorway but still attempted to remain concealed. All of the police officers were

dressed in casual clothing although all of them except Jacobsmeyer and Allen wore armbands and caps identifying them as members of TACT. Approximately thirty seconds after leaving the doorway, defendant returned and began firing at Jacobsmeyer and Allen. Both were hit. The other police then began firing into the house and were shortly joined by a large number of uniformed police responding to a radio call for assistance. Many of these officers also began firing into the house. After five or ten minutes the police ceased firing upon orders from one of their number and by loudspeaker accouncement the occupants of the house were advised that the house was surrounded by police and the occupants should surrender. Defendant and his father then left the house, unarmed, and were arrested. Upon a search of the house heroin was discovered on a dresser top in a bedroom. A pistol from which the bullet which hit Jacobsmeyer was discharged was found and a shotgun was also found.

Defendant contended that he believed the men at the door were burglars trying to force their way into his house, that he removed a pistol from his back pocket and fired at them and that he would not have done so had he realized they were police officers.

On appeal defendant raises three points. His first is that certain evidence seized from his home was inadmissible because obtained in contravention of his rights under the Fourth and Fourteenth Amendments. Following the exit of defendant and his father from the house several police officers entered the premises to search for additional persons therein. One of the officers who entered was Detective Brand who had been designated by the officer in charge of the TACT operation, Sgt. Hammer, as the "seizure officer." Defendant contends that Brand did not enter the house until an hour after the arrest of defendant and after the house had been searched for additional persons with no success. We do not find that the record sup-

ports such a contention. Brand was instructed to enter the house by Hammer and Hammer left the scene to go to the hospital to see Jacobsmeyer and Allen immediately after defendant exited the house. Although the record does not indicate precisely when Brand entered the house, it is reasonable to conclude that it was shortly after he was instructed to do so and while other officers were also inside looking for other occupants. The search for occupants continued for approximately an hour after original entry, in part because of difficulty in obtaining access to a portion of the house which was locked. In going through the house Brand found heroin, a strainer and spoon with heroin residue on them on top of a dresser in a bedroom. Other officers searching for occupants found the pistol and shotgun. All of these items were in plain view. Additionally, Brand found additional contraband in dresser drawers and hidden in some tires on a porch. Those items were not in plain view. After hearing on defendant's motion to suppress, the trial court sustained the motion as to those items found in drawers and the tires and denied the motion as to those items in plain view.

The thrust of defendant's point is that Brand's entry into the house was not under emergency circumstances and that the search conducted was not reasonable in time, spatial scope or intensity.

The general rule is that warrantless searches are unreasonable *per se* unless the action falls within certain delineated exceptions. State v. Epperson, 571 S.W.2d 260 (Mo. banc 1978). The burden of proof is upon the state to establish that an exception exists. Objective facts within the knowledge of police and reasonable conclusions objectively drawn therefrom are determinative of the reasonableness of the particular search. Terry v. Ohio, 392 U.S. 1 (1968). "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted." Bell v. Wolfish, ____ U.S. ____ (May 14, 1979).

Defendant concedes, and we also find, that the entry of the police into the house following defendant's exit therefrom was justified under the emergency circumstances then existing. At that time the police did not know how many persons had been shooting from the house, whether additional persons were still in the house and posed a danger, and whether someone might be injured inside the house. Where the basic intrusion is justified because of an emergency the seizure of items in plain view is permissible during the continuation of the emergency and so long as the search and seizure is reasonable in time, spatial scope and intensity. State v. Epperson, 571 S.W.2d 260 (Mo. banc 1978); Michigan v. Tyler, 436 U.S. 499 (1978); Mincey v. Arizona, 437 U.S. 385 (1978).

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." Coolidge v. New Hampshire, 403 U.S. 443 (1971), l.c. 466.

Two weapons which were in plain view and seized by police officers who were searching for other occupants of the house clearly met all the requirements of admissibility. Defendant contends that the heroin and related paraphernalia found on the dresser top by Officer Brand does not meet the admissibility criteria because Brand's function was not to search for suspects but for evidence or contraband. As previously stated we do not find record support for defendant's contention that Brand entered the house after the emergency had terminated. That Brand stated he believed there were no other occupants present in the house when he entered does not mean there were none. The record supports the conclusion that when Brand entered other officers were still searching for additional occupants. The nature of the search for suspects made all portions of the house capable of containing a person a legitimate area of search. The officers conducting the search were therefore entitled to seize

any evidence in plain view within an area of the house capable of concealing a person.

The question then presented is whether the seizure of items in plain view must be made by the officers coping with the emergency itself or may it be made by an officer whose function it is to seize evidence. The cases which have dealt with "plain view" searches and seizures have referred to the justification for the original intrusion by the police and have not dealt with the specific function of the seizing officer although seizures by officers not engaged in actually coping with the emergency have been upheld. *See* Michigan v. Tyler, *supra;* State v. Epperson, *supra.* Nor is it reasonable to limit seizure to those officers coping with the emergency when the emergency is one imposing danger or a need for quick action on those officers. Here the officers who were searching the house for additional occupants could clearly have seized the heroin in plain view on the dresser. But seizure of evidence requires, as a practical matter, considerable care and time. The requirements of care to avoid contamination and destruction of fingerprints and the time necessary to properly identify and mark the evidence to preserve its admissibility in court cannot practically be accomplished by officers dealing directly with an emergency involving a wounded person or a situation requiring vigilance to avoid personal danger. These very practical considerations warrant the utilization of an officer without responsibility for coping with the emergency itself to seize in a proper fashion evidence and contraband unexpectedly discovered in plain view during the legitimate intrusion occasioned by the emergency situation. Such legitimate law enforcement benefits may properly be considered by courts when balanced against minor perils to Fourth Amendment protections. Coolidge, *supra,* 403 U.S. 467.

We do not interpret the term "inadvertent" as used in Coolidge v. New Hampshire, *supra,* to encompass total surprise that evidence or contraband is present, for it is naive in the ex-

treme to believe that police would not expect to find such items during an emergency search of the scene of a crime. Rather the term "inadvertent" is contrasted in Coolidge to the circumstance where the discovery of the particular evidence is anticipated, where the police know in advance the location of the evidence and intend to seize it. 403 U.S. l.c. 470. That is not the situation here. While the police may have suspected that contraband was in the house they could not anticipate it or know of its location. The discovery was inadvertent. The intrusion into the house was justified by the emergency. The heroin and paraphernalia were discovered in plain view during that intrusion and were immediately recognized by Officer Brand for what they were.

Nor do we find that the actions of Brand in searching for evidence not in plain view affects the admissibility of the challenged evidence. The trial court properly suppressed evidence seized by Brand during that part of his search which exceeded the permissible limits under the "plain view" doctrine. The prophylactic purposes found to justify the rule of suppression of otherwise credible evidence are fully satisfied upon suppression of the evidence improperly obtained. That prophylaxis does not require suppression of evidence lawfully obtained. We find no error in the admission of the evidence.

As a sub-issue to this point, defendant challenges the admission of the shotgun into evidence on relevancy grounds. The gun was admissible to show motive, malice and knowledge as to both the assault and heroin charges. *See,* State v. Starks, 459 S.W.2d 249, (Mo. 1970) [1-5]; State v. Richardson, 515 S.W.2d 571 (Mo. 1974).

Defendant next contends that the evidence was insufficient to establish possession of the heroin, because the evidence established only joint control. Actual or constructive possession of the controlled substance together with the knowledge of the

fact of possession is an essential element which the state must prove. State v. Burns, 457 S.W.2d 721 (Mo. 1970). The possession need not be exclusive and may be established circumstantially. State v. Young, 427 S.W.2d 510 (Mo. 1968). Where joint control of a residence in which such substance is found is established there must be other evidence to support the inference of defendant's knowledge of the presence of the substance. State v. West, 559 S.W.2d 282. (Mo. App. 1977). The record does not make clear whether the bedroom in which the heroin was found was defendant's. But, when the police officers sought to purchase heroin from defendant he replied: "Just a minute, I'll go get them." He further was identified as the person who fired at Jacobsmeyer and Allen. Both his statement and his action inferring guilty knowledge were sufficient additional evidence to support a finding of knowing possession. State v. Wiley, 522 S.W2d 281 (Mo. banc 1975) [26]; State v. Stewart, 542 S.W.2d 533 (Mo. App. 1976) [16-19]; State v. Davis, 515 S.W.2d 773 (Mo. App. 1974) [9].

Defendant's final contention is that the court erred in failing to instruct on the lesser included offenses of assault without malice and common assault. Instructions on lesser included offenses are required only if supported by the evidence. When a deadly weapon is used in making an assault the law presumes malice and that the natural consequences of the act are intended in the absence of countervailing evidence. State v. Webb, 518 S.W.2d 317 (Mo. App. 1975) [5-6]. Here the evidence establishes that defendant fired two shots at and hit two police officers. His defense was that he was seeking to protect himself from men he believed to be burglars. He received a self-defense instruction. There is no evidence to support an instruction on a lessor degree of assault. The defendant was either guilty of assault with malice aforethought or he was not guilty on the basis of self-defense. State v. Webb, *surpa,* [7].

Judgment affirmed.

/s/ GERALD M. SMITH, JUDGE

/s/ HARRY L. C. WEIER,
CHIEF JUDGE

/s/ ROBERT O. SNYDER,
PRESIDING JUDGE

APPENDIX D

In the United States District Court
For the Eastern District of Missouri

Willie McCurry,
Reg. No. 33198
Missouri State Penitentiary
Jefferson City, Missouri

Plaintiff

vs.

Marvin Allen, Steven Jacobsmeyer,
and Unknown Police Officers, St.
Louis Police Department,
St. Louis, Missouri

Defendants.

Case No. _____

Civil Rights Complaint
Under 42 U.S.C.

Section 1983

(Filed July 17, 1978)

COMES NOW THE PLAINTIFF PRO SE, WILLIE McCURRY, and respectfully prays that this Court will order all defendants, including unknown police officers, to pay money damags of $1,000,000 (One Million Dollars) for the violation of the U.S. Constitutional Rights of the Plaintiff. In support of such relief, the Plaintiff states:

1.) The Plaintiff submits that the Defendants acted in a conspiracy to violate the U.S. Constitutional Rights of the Plaintiff.

2.) On or about April 9, 1977 at about 10:30 P.M. at 2525 No. Market St. in St. Louis, Missouri the Defendants came to the home of the Plaintiff, tried to force their way into the house, engaged in a gun battle, and then arrested the Plaintiff and then searched his house without a search warrant.

3.) The Defendants ordered the Plaintiff to come out of his house, which he did, and arrested the Plaintiff on the front sidewalk away from the house.

4.) When the Defendants came to the house, they did not wear uniforms, did not identify themselves immediately as police, forced their way into the house.

5.) The Defendants searched the house without obtaining a search warrant, and found drugs and other materal and contraband which was introduced in a criminal trial against the Plaintiff resulting in a conviction and Imprisonment.

6.) The Defendants admitted they searched the house in order to find contraband, and not to be certain that any other persons was in the house. The house was secured and the Defendants had over one hour before searching the house to obtain a search warrant but acted in a conspiracy not to obtain a search warrant.

7.) When the Plaintiff was arrested, he layed on the ground and was handcuffed. Then the unknown police officers assaulted the Plaintiff while he was handcuffed and helpless without provocation at all or reasonable cause, causing severe pain and injury to the Plaintiff. The Plaintiff had to go to the hospital for emergency medical care.

ARGUMENTS OF LAW

There is no doubt that the Defendants violated the U.S. Constitutional Rights of the Plaintiff by searching his house without a search warrant, since the Plaintiff was arrested on the front

sidewalk about 50 feet from the house. The Defendants searched the house in order to find contraband, not to find other people who may injure them. The Defendants had the Plaintiff handcuffed and helpless. The Defendants could have secured the premises and obtained a search warrant but refused to do so, violating the U.S. Constitutional Rights of the Plaintiff.

In a identical case at issue, the U.S. Supreme Court ruled in *Mincey* v. *Arizona,* ____ U.S. ____ (No. 77-5353, June 21, 1978) that:

> "Nor can the search be justified on the ground that a possible homocide inevitably presents an emergency situation, especially since there was no emergency threatening life or limb, all persons in the apartment having been located before the search began."
>
> "The seriousness of the offense under investigation did not itself create exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search, where there is no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant and there is no suggestion that a warrant could not easily and conveniently have been obtained."

Therefore, it is crystal clear that the Defendants acted in a conspiracy to violation of the U.S. Constitutional Rights of the Plaintiff to search his house without a search warrant, when in fact the Defendants could easily have secured the house and then obtained a search warrant from a judge. The Plaintiff was 50 feet from the house on the sidewalk, there was nobody in the house to hurt the police, and the Defendant's only purpose in searching the house was in order to find contraband itself, not to attempt to determine if there was any other people in the house that would pose a danger to the police then. The Defendants waited about an hour before searching the house by

themselves or other unknown police officers, showing that it was not an emergency situation indeed. The police should have taken the time to obtain a search warrant.

RELIEF

WHEREFORE, PLAINTIFF PRAYS THAT THIS COURT WILL GRANT THE FOLLOWING RELIEF:

1.) That this Court order the Defendants, including the unknown police officers, to pay the Plaintiff the sum of $1,000,000 (One Million Dollars) damages for the deliberate and intentional violation of the U.S. Constitutional Rights of the Plaintiff.

2.) That this Court declare that the Defendants violated the U.S. Constitutional Rights of the Plaintiff by searching his house without a search warrant.

Respectfully submitted,

/s/ Willie Mc Curry

FORMA PAUPERIS AFFIDAVIT AND OATH

I, WILLIE MC CURRY, do swear under oath that due to my poverty that I am unable to pay the costs of these proceedings or give securities thereof, that I have a meritorious action, and am entitled to relief from this court.

I, WILLIE MC CURRY, first being duly sworn to under oath, do depose and state that all statements herein are true and correct to the best of my knowledge.

/s/ Willie Mc Curry

[Jurat Omitted.]

APPENDIX E

In the United States District Court
Eastern District of Missouri
Eastern Division

Willie McCurry,

Plaintiff,

vs.

Marvin Allen, et al.,

Defendants.

No. 78-717C(1)

MOTION TO DISMISS AND MOTION FOR PARTIAL SUMMARY JUDGMENT

Come now defendants and move this Court to enter its order dismissing plaintiff's complaint on the grounds:

1. That the complaint against the St. Louis Police Department is based on respondent superior and as such cannot state a claim upon which relief can be granted.

2. That the complaint alleging unlawful search cannot be maintained and is barred by the doctrine of res judicata.

3. That the complaint alleging assault against unknown police officers does not state a claim upon which relief can be granted.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Come now defendants and move this Court to enter judgment in favor of defendants Marvin Allen and Steven Jacobsmeyer on the grounds:

1. That attached hereto as Exhibit I is a certified copy of the order of the Circuit Court regarding the search of plaintiff's

premises which holds that the search alleged in this complaint was lawful.

2. That the allegations in this complaint regarding the illegal search has been determined by a court of competent jurisdiction, and, therefore, is res judicata.

WHEREFORE, defendants pray the Court to dismiss the complaint or in the alternative to grant partial summary judgment on the issue of the illegal search.

[Signature and certificate of service omitted.]

"EXHIBIT I"

STATE OF MISSOURI,

City of St. Louis,

ss.

I, GEORGE M. SOLOMON, Clerk of the Circuit Court of the City of St. Louis, for Criminal Causes, which said Court is a Court of Record, having a Clerk and seal, certify that the above and foregoing is a full, true and complete copy of MOTION TO SUPPRESS and Memorandum of October 6, 1977, ruling on MOTION TO SUPPRESS. in the cause of the State of Missouri, plaintiff, vs WILLIE G. MC CURRY, CAUSE #77-862 defendant, as fully as the same appears of record and on file in my office.

WITNESS my hand and the seal of said Court hereto affixed, at office, in the City of St. Louis, this 31st day of August A.D. 1978.

/s/ George M. Solomon
Clerk of the Circuit Court of
the City of St. Louis, for
Criminal Causes.

[Remainder of Authentication Omitted.]

["EXHIBIT I" CONTINUED]

Cause No. 77-862
STATE OF MISSOURI
vs.
WILLIE G. MC CURRY

IN THE
CIRCUIT COURT
CRIMINAL CAUSES
CITY OF ST. LOUIS
Oct. 6 1977

Defendant's Motion to Suppress heard and submitted and overruled in part and sustained in part as follows.

(a) Motion to suppress overruled as to those items found in full view such as a gun and drugs on a dresser top and a shotgun.

(b) Motion sustained as to drugs and items found in drawers or among tires are suppressed.

CAUSES RETURNED TO DIV. 16
FOR FURTHER PROCEEDINGS

[SIGNATURES OMITTED.]

["EXHIBIT I" CONTINUED]

In the Circuit Court
of the City of St. Louis
State of Missouri

State of Missouri,
Plaintiff,
vs.
Willie Grady McCurry,
Defendant.
Cause No. 77-862

Charge: ASSAULT W. INT. TO KILL
ILLEGAL POSS OF HEROIN

MOTION TO SUPPRESS

(Filed September 16, 1977)

Defendant, by his counsel, moves the Court as follows:

1. There is now pending in this Court, the above captioned cause, wherein the defendant is charged with: ASSAULT WITH INTENT TO KILL (TWO COUNTS) and POSSESSION OF HEROIN

2. Your petitioner verily believes there is now in the hands of officials of the State of Missouri, and available to the attorney for the State of Missouri, evidence, which the State intends to use against the defendant, in the nature of: A Pistol 22 Caliber, and Heroin.

3. Your petitioner, respectfully moves the Honorable Court to suppress said evidence on the grounds that it was obtained by an unlawful and unconstitutional search and seizure, and as the result of an illegal arrest, all in violation of the defendant's

rights under Sections 10, 15, 18a, and 19 of Article I of the Constitution of the State of Missouri, and in violation of the defendant's rights under the 4th, 5th, 6th and 14th Amendments to the Constitution of the United States of America.

WHEREFORE, the premises considered, your petitioner moves the Honorable Court to suppress any and all evidence alleged to have been seized at the time of or just prior to the arrest of the defendant, and especially: A 22 Caliber Pistol and Heroin.

[Signature Omitted.]

APPENDIX F

In the United States District Court
For the Eastern District of Missouri

Willie McCurry, Plaintiff, vs. Marvin Allen, et al, Defendant.	Case No. 78-717C(1) Motion for Summary Judgment or Trial By Jury

COMES NOW THE PLAINTIFF PRO SE, WILLIE MC CURRY, and prays that this Court grant summary judgment for the Plaintiff, or in the alternative, grant a prompt trial by jury on this civil rights complaint. In support of such relief, the Plaintiff states:

1.) The Plaintiff is not suing the St. Louis Police Dept., but rather the police officers for the violation of his constitutional rights.

2.) The complaint is not barred by res judicata because only the Circuit Court of City of St. Louis has ruled that the search was legal, and the federal courts have not ruled that the search was legal. In *Smith* v. *Sinclair,* 424 F. Supp. 1108 (W.D. Okla. 1976), the federal district court had ruled on the issue of the violation of the federal constitutional rights. Just because the ste court has ruled against the Plaintiff regarding the legality of the search and seizure does not bar the Plaintiff from seeking judicial relief in the federal courts on the same issue. If that were the case, then this court could not rule on any habeas corpus petitons since the state circuit court and appeal courts rule against the prisoner on the allegations of violation of his constitutional rights. The Plaintiff is not seeking release from prison or a new trial, only money damages, and therefore this Court has jurisdiction to hold a trial in this matter.

3.) The Defendants in their pleadings do not deny that (a) the police officers did not obtain a search warrant, (b) the police officers waited one hour prior to searching the house so there is no claim of an emergency situation, (c) the police officers do not deny they could have secured the house and obtained a search warrant prior to the search, (d) the police officers did not search the house for people who might harm the police but to find contraband and drugs, (e) the Plaintiff was arrested about 50 feet in front of the house and could not have obtained weapons from the house as he was in custody and handcuffed, and (f) that the Defendants did not know as police officers that they had the obligation to obtain a search warrant prior to searching the house. There is no doubt that the search was unconstitutional. *Mincey* v. *Arizona,* ____ U.S. ____ (No. 77-5533, June 21, 1978); *Agnello* v. *U.S.,* 269 U.S. 20; *Preston* v. *U.S.,* 376 U.S. 364; *Chimel* v. *California,* 395 U.S. 752 (1969).

4.) The Plaintiff that a police officer by the name of Sargeant Burgdorf assaulted the Plaintiff while handcuffed, according to trial transcript. The Plaintiff did not know the name of this officer at the time of the filing of the civil rights complaint. The Plaintiffs alleged tht Sgt. Burgdorf used unnecessary amount of force in beating the Plaintiff with a nightstick or nightclub while Plaintiff was handicuffed behine his back, and this unjustified assault is cruel and unusual punishment. The Defendants do not claim that the amount of force used in striking the Plaintiff while handcuffed.

WHEREFORE, PLAINTIFF PRAYS THAT THIS COURT GRANT SUMMARY JUDGMENT OR ORDER A TRIAL BY JURY PROMPTLY IN THIS CASE.

[Signature Omitted.]

A MOTION TO DISPENSE WITH THE PRINTING

OF THE APPENDIX WAS MADE AND GRANTED